Filed 5/12/09 In re T.M. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re T.M. et al., Persons Coming Under the Juvenile Court Law.	
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. S.S., Defendant and Appellant; A.F., Defendant and Appellant.	B209106 (Los Angeles County Super. Ct. No. CK53816)

APPEAL from orders of the Superior Court of Los Angeles County. Richard D. Hughes, Juvenile Court Referee. Affirmed.

Anna L. Ollinger, under appointment by the Court of Appeal, for Defendant and Appellant, S.S.

Andrea R. St. Julian, under appointment by the Court of Appeal, for Defendant and Appellant, A.F.

Raymond G. Fortner, County Counsel, James M. Owens, Assistant County Counsel, and Aileen Wong, Deputy County Counsel, for Plaintiff and Respondent.

Appellant S.S. (Mother), joined by appellant A.F. (Father), appeals the juvenile court's order terminating parental rights over her daughter, H. Father also appeals the order denying a hearing on his Welfare and Institutions Code section 388 petition.[1] This is the parties' second appeal. In 2008, we reviewed and affirmed the court's jurisdictional and dispositional orders, including an order that denied both parents reunification services. After review of the most recent proceedings and the contentions raised in this appeal, we once again affirm.

Factual and Procedural Background

A. *Prior Appeal*

Mother has four daughters. H., born in July 2003, is the second. H. and her older half-sister sister, T.M. (born in April 2001), came to the attention of the Department of Children and Family Services (DCFS) in October 2003, when H. was an infant. The initial petition alleged physical abuse and excessive discipline of T.M. by Mother. An amended petition alleged that Father had been involved in a violent altercation with T.M.'s biological father, Jose, and had an unresolved history of domestic violence. Initially, H. was detained with Father and Father was offered family maintenance services -- parent education and anger management classes, as well as individual counseling to address anger and domestic violence issues. Without addressing these issues, Father moved to an unknown location and left H. with his mother (H.'s paternal grandmother), who eventually gained formal custody. In March 2004, a second amended petition was filed, alleging that Father had abandoned H. As part of the disposition, the court ordered Father to take parent education classes and undergo counseling. Father had, however, ceased all

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[1] Unless otherwise designated, statutory references are to the Welfare and Institutions Code.

communication with DCFS and did not complete any part of the reunification program.

Mother completed her reunification program and in 2005, H. and T.M. were returned to her custody. Before jurisdiction could be terminated, Jose and his wife informed the caseworker that T.M. had accused Father of touching her improperly. This led to a second amended petition in which Father was accused of sexual abuse and Mother was accused of failure to protect.

At the contested jurisdictional hearing, T.M. testified that Father had touched her in her private area when she was four and had also touched her sisters in that area. The evidence before the court also included the testimony of Jose and a report from a nurse who had examined T.M. and observed a jagged edge on her hymenal tissue that could have been caused by a fingernail. The court concluded Father had sexually abused T.M. by digitally penetrating her and had inappropriately touched H. and another sister, L.F. (born January 2005). At the dispositional hearing, Mother was provided six months of reunification services with respect to her younger daughters, L.F. and C.S. (born October 2006). However, the court provided neither parent reunification services with respect to H. The court's denial of reunification services was based on the fact that Mother had already had over 18 months of services directed toward reuniting with H. -- the maximum allowable under the statutes.[2] In addition, Father had had 12 months of services between April 2004 and May 2005, and the court concluded there was no possibility H. would be returned to him in six months if further services were provided.[3]

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[2] See section 361.5, subdivision (a).

[3] See sections 361.5, subdivision (a), 366.21, subdivision (g)(1).

Mother and Father appealed both the jurisdictional and dispositional orders. By opinion dated November 18, 2008, this court affirmed the orders. We concluded that substantial evidence supported the court's factual findings regarding Father's sexual abuse and Mother's failure to protect. In his appeal, Father attacked the credibility of the witnesses. As we pointed out, we have no power to resolve credibility. Having heard the live testimony of the witnesses and reviewed their statements to the caseworker, the juvenile court resolved the credibility issue against Father, and this court could not relitigate that finding. We further concluded that the court's decision to disallow reunification services with respect to H. was in accord with the governing statutes.

B. *Proceedings During Appeal*

While the appeal from the jurisdictional and dispositional orders was pending, the juvenile court prepared to proceed to the next stage, a section 366.26 hearing to determine whether parental rights over H. should be terminated. In the January 2008 section 366.26 report, the caseworker stated that H. was developmentally on target and emotionally stable. Her foster mother had indicated interest in adopting H. and her two younger sisters, but was hesitant about beginning the home study because there were other persons identified as possible caretakers of the children.[4] The caseworker noted that not only was the prospective adoptive mother a licensed foster caregiver, but she had adopted a child in the past and thus had a full understanding of the responsibilities involved. Mother sought unmonitored visitation, but was told she first must participate in a CSAP (child sexual abuse counseling) program. Mother had not visited H. in

[4] H.'s paternal grandmother and a childhood friend of Mother's had expressed interest in obtaining placement of H. and her younger sisters.

November or December 2007. Emphasizing Mother's "lengthy history of . . . not fully complying or being forthcoming with the Department" and her failure to "participate in programs that would facilitate successful reunification with her children" and noting that Father had "not maintained any type of bond or contact with [H.]," the caseworker recommended termination of parental rights.

The section 366.26 hearing was continued several times. In the interim, DCFS issued several more status reports. In March 2008, the caseworker reported that Mother had enrolled in a drug rehabilitation program, was visiting the children two to three times monthly and was attending Narcotics Anonymous (NA) meetings. The caseworker questioned whether Mother had "grasped the severity of the allegations involving [T.M.] and [Father]" because "she ha[d] not received the ordered intensive counseling to address sexual abuse for non-offending parents." The caseworker discussed with Mother her failure to participate in random drug testing or to obtain CSAP counseling.[5] Despite being informed otherwise, Mother said she could not attend CSAP counseling because she was not the offender. The caseworker also expressed concern over Mother's continuing relationship with Father and the possibility that she would resume the relationship should the children be returned to her. The caseworker heard from a police detective that T.M. had been advised by Mother to lie about the sexual abuse so that Father would not go to jail. The caseworker also received information that Mother had visited Father while he was in custody. With respect to the adoptability of H., the March report stated that the home study was not complete, but that the prospective parent "ha[d] successfully adopted in the past and there are no know[n] impediments [to] the completion of the home study . . . ."

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[5] A letter from Mother's drug counselor indicated that she was undergoing some testing as part of the program. At least one test was diluted, which happens when the participant drinks excessive amounts of water before the test.

In May 2008, DCFS reported that Father had been released from custody after accepting a plea bargain to child endangerment, but had not contacted the caseworker to arrange visitation with H. H.'s foster mother had expressed interest in adopting H. and her two younger sisters. The caseworker concluded that because of Mother's continued association with Father and her failure to complete CSAP counseling, "the risk level for abuse and failure to protect remains high for the children . . . ." The caseworker continued to recommend adoption as the permanent plan for H.

In June 2008, DCFS reported that Father had visited with H. and her sister L.F., but that the children appeared "uncomfortable" and Father appeared "bored." Before the allotted time expired, the children asked to go home with their "mommy," referring to their foster mother. The caseworker reported that the adoption home study was "near completion," that the foster mother's divorce documentation "is the only thing pending," and that the home study would be completed "as soon as DCFS receives the documents."

On the day before the June 26, 2008 section 366.26 hearing, Father submitted a petition for modification under section 388.[6] In it, Father asked the court to provide reunification services and reverse the order sustaining the sexual abuse allegations. Father established that he had been released from custody after pleading guilty to child endangerment. Father also submitted the report of a medical expert who had reviewed the records of the examination of T.M. and found no evidence of torn and healed hymenal tissue or anything else to suggest digital penetration had occurred. The court reviewed the petition and denied it

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[6] Mother also submitted a petition for modification, but does not raise any issue concerning her separate petition on appeal.

summarily, finding the request failed to show it would be in H.'s best interests to modify the orders.

At the contested section 366.26 hearing, DCFS, in arguments joined in by H.'s counsel, urged the court to terminate parental rights. Mother opposed the request, testifying that she had completed a drug counseling program and had undergone numerous individual counseling sessions that addressed both drug abuse and sexual abuse. In addition, she was attending NA meetings, although she had not yet completed the 12 steps or obtained a sponsor. Mother said she was no longer involved with Father and would not allow him to have any contact with the children if they were returned to her. When she visited the children, she played with them and talked to them. The older children called her "mommy" and asked when they could come home. Sometimes they cried when the visits ended.

The court terminated Mother and Father's parental rights over H. At the hearing, the court explained: "[N]either of these parents has acted in a parental role for [H.] in a very long time. . . . [M]other's visits were more of a play event rather than an actual parenting event. And [Father] has not had much contact with H. in the past year because of his incarceration." The court's order included the following findings: "[I]t will be detrimental for [H.] to be returned to the parent(s)" and "it is likely that [H.] will be adopted." Mother and Father appealed the court's rulings.

DISCUSSION

A. *Mother's Appeal*[7]

1. *Adoptability*

Mother's appeal focuses on the court's finding of adoptability, contending that this finding was not supported by substantial evidence because there was a "legal impediment" to the foster mother's plan of adoption. We conclude there was no evidence of a legal impediment to H.'s adoption by the foster mother, and the evidence that was before the court did not undermine its finding that H. was adoptable.

At the section 366.26 hearing, the court has several options under the statute: (1) terminate parental rights and free the child for adoption, (2) identify adoption as the permanent plan and continue the hearing to locate an appropriate adoptive home; (3) appoint a legal guardian; or (4) order that the child be placed in long-term foster care. (§ 366.26, subd. (b); *In re B.D.* (2008) 159 Cal.App.4th 1218, 1231.) Before terminating parental rights, the court must find by clear and convincing evidence that the child is likely to be adopted within a reasonable period of time. (§ 366.26, subd. (c)(1); *In re B.D.*, *supra*, at p. 1231; *In re R.C.* (2008) 169 Cal.App.4th 486, 491.) "Clear and convincing evidence 'must be so clear as to leave no substantial doubt; it must be sufficiently strong to command the unhesitating assent of every reasonable mind. [Citations.]'" (*In re Jennilee T.* (1992) 3 Cal.App.4th 212, 223-224, quoting *In re Victoria M.* (1989) 207 Cal.App.3d 1317, 1326.) On review, the Court of Appeal determines whether the record contains substantial evidence from which the juvenile court could have found that the child was likely to be adopted within a reasonable time, bearing in

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[7] Father's brief does not discuss or analyze the termination order, but contends that if termination of parental rights is reversed as to Mother, it must also be reversed as to him.

mind the heightened burden of proof. (*In re B.D.*, *supra*, 159 Cal.App.4th at p. 1232; *In re Alvin R.* (2003) 108 Cal.App.4th 962, 971.)

In determining whether a child is adoptable, the court's primary focus should be on the child -- "whether his [or her] age, physical condition and emotional state make it difficult to find a person willing to adopt him [or her]." (*In re David H.* (1995) 33 Cal.App.4th 368, 378; accord *In re R.C.*, *supra*, 169 Cal.App.4th at p. 491; *In re B.D.*, *supra*, 159 Cal.App.4th at p. 1231.) "The present existence or nonexistence of a prospective adoptive parent -- that is, a person who has filed or intends to file a petition to adopt the child [citation] -- is a factor in determining whether the child is adoptable, but is not in itself determinative. '[I]t is not necessary that the minor already be in a potential adoptive home or that there be a proposed adoptive parent "waiting in the wings."'" (*In re David H.*, *supra*, 33 Cal.App.4th at p. 378, quoting *In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) However, "the fact that a prospective adoptive parent has expressed interest in adopting the minor is evidence that the minor's age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the minor. In other words, a prospective adoptive parent's willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent or by some other family." (*In re Sarah M.*, *supra*, at pp. 1649-1650, italics omitted; accord, *In re R.C.*, *supra*, 169 Cal.App.4th at p. 491.)

Here, DCFS's January 2008 section 366.26 report made clear that there were no physical, mental or emotional problems to interfere with H.'s potential for adoption. She was, in addition, very young -- only five years old. Moreover, not only had the foster mother expressed interest in adoption, but two others had stepped forward and asked to be considered as long-term caregivers. Thus, the evidence supported that H. was generally adoptable, and the bare possibility that

the foster mother would not ultimately adopt her or that some legal impediment would preclude the foster mother from going forward in the future did not undermine the court's factual finding that H. would be adopted within a reasonable time. (See *In re L.Y.L.* (2002) 101 Cal.App.4th 942, 956 [evidence supported that minor was generally adoptable because "she was female, in good health, developing normally, and had a sociable personality[,] . . . and her foster parents were willing to adopt her"].)

Mother insists that the juvenile court's finding was unsupported because there was a legal impediment to the foster mother's adoption of H. -- her failure to provide copies of her divorce documents. (See Fam. Code § 8603 ["A married person, not lawfully separated from the person's spouse, may not adopt a child without the consent of the spouse provided that the spouse is capable of giving that consent."].) It is true that "when a child is adoptable only because a particular family is willing to adopt, the juvenile court must consider whether there are any legal impediments to adoption by that family." (*In re Brandon T.* (2008) 164 Cal.App.4th 1400, 1410; accord, *In re Valerie W.* (2008) 162 Cal.App.4th 1, 15.) Here, the minor's adoptability was not contingent solely on her current caregiver's willingness to adopt. The evidence supported that she was generally adoptable. Moreover, even were we to assume that the court's adoptability finding was based solely on the willingness of the current foster mother to adopt, there was no evidence to suggest that an actual legal impediment precluded the foster mother's pursuit of that plan. The report stated that the foster mother had yet to provide *documentation* of her divorce, not that she was married and unable to proceed with the adoption without the cooperation of her spouse.[8] Accordingly, the court's

[8] After the appeal was filed, we granted respondent's request for judicial notice that the home study has been completed. As the divorce documentation was the only

finding was supported regardless of whether it was based based on H.'s general adoptability or solely on the foster mother's willingness to adopt her.

2. *Preliminary Assessment*

For the first time on appeal, Mother contends that DCFS failed to comply with section 366.22, which requires that DCFS prepare a report prior to the section 366.26 hearing which includes "[a] preliminary assessment of the eligibility and commitment of any identified prospective adoptive parent . . . to include a social history including screening for criminal records and prior referrals for child abuse or neglect, the capability to meet the child's needs, and the understanding of the legal and financial rights and responsibility of adoption . . . ." (§ 366.22, subd. (b)(1)(D).) Objections to the adequacy of DCFS's preliminary assessment not raised at the hearing will not be considered on appeal. (*In re L.Y.L.*, *supra*, 101 Cal.App.4th at p. 956, fn. 8; *In re Crystal J.* (1993) 12 Cal.App.4th 407, 411.) Moreover, while the January 2008 report stated that the foster mother did not wish to begin the adoption home study process for H. until the question of H.'s custody was resolved, the report also noted that the foster mother had a foster care license and had adopted in the past. This information was sufficient to satisfy the requirements of section 366.22, subdivision (b)(1)(D). (See *In re Diana G.* (1992) 10 Cal.App.4th 1468, 1481-1482 [noting that as licensed foster caregivers, prospective adoptive families "had already been required, on a continuing basis, to submit to the Department evidence of 'reputable and responsible character'; 'criminal record clearance,' including any record of criminality more serious than a 'minor traffic violation'; employment history; character references; adequate

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outstanding issue precluding completion of the report, we assume the foster mother provided the required documentation.

financial resources sufficient to maintain statutory standards; and an 'ability, readiness and willingness . . . to meet the varying needs of a child'"]; cf. *In re B.D.*, *supra*, 159 Cal.App.4th at p. 1233 [suggesting that a current foster care license would be an adequate substitute for a preliminary assessment of foster parent's eligibility and commitment]; *In re Valerie W.*, *supra*, 162 Cal.App.4th at pp. 14-15 [same].)

B. *Father's Appeal*

Father contends the juvenile court abused its discretion by declining to grant an evidentiary hearing on his petition for modification. We disagree.

"A dependency order may be modified if a person shows a change of circumstances or new evidence which establishes that modification of the prior order is in the minor's best interests." (*Nahid H. v. Superior Court* (1997) 53 Cal.App.4th 1051, 1068.) Where a parent believes new evidence casts doubt on a sustained jurisdictional allegation, a petition for modification under section 388 is the appropriate procedure to follow. (*In re Brandon C.* (1993) 19 Cal.App.4th 1168, 1173-1174.) Section 388 permits "[a]ny parent or other person having an interest in a child who is a dependent child of the juvenile court" to petition "for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court" on grounds of "change of circumstance or new evidence." (§ 388, subd. (a).) "If it appears that the best interests of the child may be promoted by the proposed change of order, . . . the court shall order that a hearing be held and shall give prior notice . . . ." (*Id.*, subd. (d).) "Section 388 thus gives the court two choices: (1) summarily deny the petition or (2) hold a hearing." (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 912.) "'[I]f the petition fails to state a change of circumstances or new evidence that might require a change of order, the court may deny the application ex parte. [Citation.]'" (*Ibid.*,

quoting *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1450.) "On the other hand, 'if the petition presents any evidence that a hearing would promote the best interests of the child, the court will order the hearing.'" (*In re Lesly G.*, *supra* at p. 912, quoting *In re Heather P.* (1989) 209 Cal.App.3d 886, 891.)

"In order to avoid summary denial, the petitioner must make a '"prima facie"' showing . . . . " (*In re Lesly G.*, *supra*, 162 Cal.App.4th at p. 912; accord, *In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) "A 'prima facie' showing refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited. [Citation.]" (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593.) An appellate court reviews the juvenile court's summary denial of a section 388 petition for abuse of discretion. (*In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1079.)

The juvenile court did not abuse its discretion in summarily denying Father's section 388 petition. In support of his petition, Father presented the opinion of a medical expert who contradicted the opinion of the nurse who had examined T.M. and concluded that a physical abnormality supported the child's accusation of improper touching. If Father's evidence were fully credited, it would at best create a conflict concerning whether the physical evidence supported T.M.'s reports of abuse. This does not amount to evidence that would necessarily sustain a decision favorable to Father. As stated in our prior opinion, "[a] child's testimony alone can support a court's finding of physical or sexual abuse." Father's petition did nothing to discredit T.M.'s testimony, which was "repeated . . . consistently over the course of being questioned by Jose, [his wife], the caseworker, the examining nurse, the court and the parties' attorneys." Accordingly, the court did not abuse its discretion in denying the petition for modification to the extent it sought to re-open the jurisdictional findings.

The other evidence presented in Father's petition was insufficient to support that H.'s best interests lay in modifying the court's prior order regarding reunification services. At the time the petition was filed, H. had been in her prospective adoptive parent's home for approximately two years. Father presented evidence that he was no longer incarcerated or in danger of incarceration and thus was available to begin the process of reinstating himself in H.'s life. However, petitions filed at the last minute -- in this case, on the eve of the continued section 366.26 hearing -- must do more than show that the offending parent is ready to begin the process of reunification. By the time of the section 366.26 hearing, the court's focus must shift from the parents' rights to custody of and authority over their children to "the needs of the child for permanency and stability." (*In re Marilyn H., supra*, 5 Cal.4th at p. 309.) "The burden . . . is on the parent to prove changed circumstances pursuant to section 388 to revive the reunification issue." (*In re Marilyn H., supra*, 5 Cal.4th at p. 309.) If this seems unduly burdensome, "[i]t must be remembered that up until the time the section 366.26 hearing is set, the parent's interest in reunification is given precedence over the child's need for stability and permanency. This could be for a period as long as 18 months. Another four months may pass before the section 366.26 hearing is held.[9] While this may not seem a long period of time to an adult, it can be a lifetime to a young child. Childhood does not wait for the parent to become adequate. [Citation.]" (*In re Marilyn H., supra*, 5 Cal.4th at p. 310.)

Here, the evidence established that Father had not been a consistent presence in H.'s life since she was an infant. After leaving H. with his own mother in early 2004, Father had no regular contact with the child for the next four years. During the June 2008 visitation, H. appeared uncomfortable around him and anxious for

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[9] We note that in this case the period during which H. had been awaiting permanency and stability was much longer than 22 months.

the visit to end. Moreover, Father had failed to complete the plans designed to address the problems that led to either the initial or the later detention. The evidence in Father's petition did not show a change in circumstances that would justify disrupting H.'s new life. Thus, the court's decision to summarily deny the section 388 petition and proceed with the section 366.26 hearing was the proper one.

DISPOSITION

The order terminating parental rights and the order summarily denying Father's section 388 petition are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.